

**Subject:** Re: Request for Leave to file, re Burden of Proof. EB Docket No. 11-71 Maritime Communications/Land Mobile

**From:** Warren Havens (warren.havens@sbcglobal.net)

**To:** Richard.Sippel@fcc.gov; Mary.Gosse@fcc.gov; Denise.Villarreal@fcc.gov;

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**Date:** Tuesday, June 12, 2012 7:51 AM

The attachment noted below is attached this time.

**From:** Warren Havens <warren.havens@sbcglobal.net>  
**To:** Richard Sippel <Richard.Sippel@fcc.gov>; Mary Gosse <Mary.Gosse@fcc.gov>; Denise Villarreal <Denise.Villarreal@fcc.gov>  
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**Sent:** Tuesday, June 12, 2012 7:23 AM  
**Subject:** Request for Leave to file, re Burden of Proof. EB Docket No. 11-71 Maritime Communications/Land Mobile

**Judge Richard Sippel,**

As an initial matter, the bankruptcy court issued the written Order regarding preservation of the "100 Boxes" or records pertaining to the Maritime site based licenses.

- A copy is attached hereto. I received this at the end of last week.
- The storage company has just determined the amount that due under the storage agreement signed by John Reardon (CEO of Mobex and Maritime), and other costs, and SkyTel will pay these, the proceed to have a bonded copier execute the document preservation task described in this Order.

*SkyTel remains the only party in this Hearing making any effort, and bearing any costs, to preserve these records for their relevant use.*

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Regarding the main topic of this email: for SkyTel-H (I will coordinate with Mr. Jackson re SkyTel-O entities):

***I respectfully request leave to file a memorandum of facts with attached relevant documents, and with relevant law on this issue of the burden of proof regarding issue (g), subject of your Order FCC 12M-26 (May 23, 2010).***

I intend to submit formally a motion for leave with the memo, however, I first wanted to submit this informal request, in case you choose to respond to this.

Among matters the contemplated memo will address include the below.

- Facts will be separated from legal argument, and all facts will be proved up (documentation provided, or citations to where it can be located in FCC records).

- What I indicate below as facts, including the indicated FCC decisions and relevant parts thereof, will be presented.

## **1. Issue (g) is fact based: the law applied is "automatic."**

The rules cited in FCC 11-64 on issue (g) in the text deal with "automatic termination without specific Commission action." (Emphasis added.) I believe is central to the burden of proof.

In this regard, relevant facts include:

- Some of the Wireless Bureau decisions at to "automatic termination without specific Commission Action" including on AMTS site based stations.
- The initial notices of station activation: We can provide copies obtained from the official station files. These clearly and literally do not report any construction or commencement of service.
- The simple question and answers composing the FCC "audit" in 2004. It was not an "audit" as that term is used in any formal sense. It was a simple question without any fact finding examination or testing. It also was not placed on public notice, *although* it was described as a relevant action the FCC would take before the first AMTS auction in one of the pre-auction public releases describing the auction, and due diligence as to ULS-listed site-based incumbent stations.
- The (erroneously-designated) "audit" responses also did not provide any proof of construction or operation, nor even any details sufficient to even tell the service-coverage (see above) or if the station was CMRS as required for AMTS under §20.9(a)(5).
- However, the Mobex responses did admit to keeping and renewing many stations around the nation that had automatically terminated. It is unlawful to renew keep and renew terminated stations: they must be turned in: see §80.49(a)(3): *John Reardon was in charge of Mobex and now is CEO of Maritime*.
- US Supreme Court precedent, with relevant parts noted, that hold that once a party seriously misrepresents to the FCC, the FCC need not (and should not) accept their further assertions of fact, and the burden is on them to prove up any assertion.
- FCC decisions on the site based licenses: as they show, they did not adjudicate their validity of construction or operation.

## **2. FCC law places the burden on Part 80 licenses to keep the proof and details of station operations.**

In this regard, relevant facts include:

- Parts of the Communications Act and FCC rules, including §80.409 including (b)(1) **[\*]**, that require that the evidence and details of station operation (thus also construction) be maintained (without time limitation) in the event of FCC investigation, or third party complaint-- which for Maritime has been the case since prior to Auction 61: see endnote below.**[\*]** Maritime has breached this requirement. The memo will include:
- Examples prior to this Hearing of Maritime failing to maintain evidence of station construction and operation. Within the hearing, this continues.
- The Maritime and Mobex story of placing the critical evidence of the site-based stations history-- the "100 Boxes"-- in storage, not paying the storage company (only a few thousand dollars in past due charges) and then in formal FCC proceedings asserting "belief" that the records were destroyed, but not making a phone call to find out. This is a prime example.
- *A party that breaches a duty and prejudices others, loses related rights: here, for Maritime, any right of the burden of proof being on the FCC trial staff.*

- The Hearing Designation Order, FCC 11-64, cannot be read to excuse Maritime of the fundamental duty to comply with FCC law to keep station records, and to make simple phone calls to retrieve a hundred boxes of or including station records it stored, since without these records, no FCC licensing rules and adjudication has the required evidence.

### **3. Maritime AMTS stations are self-described as *not* CMRS but failed to comply with the discontinuance rule §80.471.\***

The memo will present the related CMRS forbearance decision (related to §20.15 (b)(3) that is cited in §80.471).

*These demonstrate that a station using AMTS frequencies but that is not CMRS is not subject to that forbearance and thus cannot be off the air without application to and approval by the FCC. Since no permission was obtained, no allowance to resume operations is authorized, i.e., permanent discontinuance, even if the stations were timely and properly constructed.*

Relevant additional facts (in addition to these rules and decisions) include:

- Maritime stated to the FCC in a proceeding to seek \$1.3 million refund of fees paid for Universal Service Fund (with Forms 499A), that the site based licenses were not CMRS (no interconnection). The pleadings and decision will also be presented in the contemplated memo.

### **4. The issue (g) component whether stations were timely and properly constructed is based on required coverage.**

Facts we will show include:

- The parts of FCC 11-64, in discussion of this issue (g) in the text, that reference the rules that describe the construction of AMTS site-based licenses in terms of the required continuity of service coverage.

- FCC decisions as to this required coverage-- and that it must be applied in the future to site-based AMTS licensees if it can be show factually that they failed to construct the required continuity of coverage.

- SkyTel-commissioned expert engineering studies showing that the required coverage was never satisfied by a very wide margin by Maritime's predecessors.

Note: Maritime argued to the Wireless Bureau that this showing should be processed in this Hearing. We will show this Maritime pleading.

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The Maritime position appears to be an impermissible attempt to reconsider and modify FCC 11-64, the Hearing Designation Order, since that Order established issue (g) based on "automatic termination" rules and the evidence to date that there automatic termination had taken place by action of law: as indicated above, that is a factual matter, not a matter of legal argument or wrangling ("automatic termination without specific Commission action").

Also as indicated above, stations with AMTS frequencies operated as PMRS that are discontinued without FCC approval must be deemed permanently discontinued, for violation of the letter and spirit of §80.471.

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[\*] Endnote.

§80.409 (emphasis added)

\* \* \* \*

(b) Availability and retention. Station logs must be made available to authorized Commission employees upon request and retained as follows:

(1) Logs must be retained by the licensee for a period of two years from the date of entry, and, when applicable, for such additional periods as required by the following paragraphs:

- (i) Logs relating to a distress situation or disaster must be retained for three years from the date of entry.
- (ii) If the Commission has notified the licensee of an investigation, the related logs must be retained until the licensee is specifically authorized in writing to destroy them.
- (iii) Logs relating to any claim or complaint of which the station licensee has notice must be retained until the claim or complaint has been satisfied or barred by statute limiting the time for filing suits upon such claims.

Regarding the above (1) Maritime was notified of an investigation of its AMTS licenses commencing close to several years before this hearing commenced (first by the Wireless Bureau, then by the Enforcement Bureau), and (2) Maritime and its predecessor Mobex were subject to formal complaints by SkyTel since well before Auction 61. Yet Maritime and Mobex elected to get rid of its station files: the "100 Boxes" in storage, and otherwise the disappeared station files.

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Respectfully submitted,

/s/

**Warren Havens**

An individual party *pro se*,

And for SkyTel-H entities, as to facts